Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

No. 96-534

In The

Supreme Court of the United States

October Term, 1996

ARNOLD C. ANCHONDO, WILLIAM T. BEATTY, HENRY GARZA, LOUIS A. DURAN, JR., GARY W. JOHNSON, FRANK LEYVAS, FRANK CARRANZA, JESSE ENCINAS, DEE HARRIS, ERNEST LOPEZ, CHARLES MASTERS, BASILIO MORRILLO, TERRELL NEWMAN, DONALD PECKHAM, ALBERT RAMOS, LEROY SHELTON, OCTAVIO SOTELO, CHARLES TAGHON AND MANUEL VALENZUELA,

Petitioners,

v.

CYPRUS MINERALS COMPANY and CYPRUS COPPER COMPANY, a wholly owned subsidiary dba CYPRUS SIERRITA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Arizona Court Of Appeals, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

JON E. PETTIBONE
Counsel of Record for Respondents
QUARLES & BRADY
One East Camelback Road
Suite 400
Phoenix, Arizona 85012
(602) 230-5572

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9 pp

QUESTION PRESENTED

Whether the exclusionary clause of section 1 of the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*) refers only to those workers directly engaged in the movement of goods in foreign or interstate commerce.

LIST OF ALL PARTIES

Petitioners are as set forth in the caption of this case.

Respondents are Cyprus Amax Minerals Company (f/k/a Cyprus Minerals Company), its wholly owned subsidiary, Cyprus Climax Metals Company (f/k/a Cyprus Copper Company), and its wholly owned subsidiary, Cyprus Sierrita Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. Proceedings and Disposition Below 2

B. Correction of Misstatements in the Petition... 3

REASONS FOR DENYING THE WRIT 4

A. This Court is Without Jurisdiction 4

B. There is Not a Substantial Federal Question.. 4

CONCLUSION 6

TABLE OF CITATIONS

Page

CASES CITED:

Armijo v. Prudential Ins. Co., 72 F.3d 793 (10th Cir. 1995) 5

Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995) 4, 5, 6

Barclay v. Jones, 127 Ariz. 282, 619 P.2d 1059 (App. 1980) 4

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) 4

Dickstein v. Dupont, 443 F.2d 783 (1st Cir. 1971) 4

Domino Sugar Corp. v. Sugar Workers Local Union No. 392, 10 F.3d 1064 (4th Cir. 1993) 5

Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972) 4

Miller Brewing Co. v. Brewery Workers, 739 F.2d 1159 (7th Cir. 1984) 4

Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3rd Cir. 1993) 5

Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994) 5

Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996) 4

Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers, 207 F.2d 450 (3rd Cir. 1953) 4

TABLE OF CITATIONS – Continued

Page

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957) 5

Wedding v. University of Toledo, 89 F.3d 316 (6th Cir. 1996) 5

Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) 5

STATUTES CITED:

9 U.S.C. § 1 (Federal Arbitration Act, § 1) 1, 4, 5

28 U.S.C. § 1257 ..... 1, 4

29 U.S.C. § 185 (Labor Management Relations Act, § 301) 5

A.R.S. § 12-1517 ..... 1, 2, 3

RULE CITED:

Supreme Court Rule 15.2 3

APPENDIX

Appendix A – Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment Re: Arbitration, dated September 14, 1995 (excerpt).... App. 1

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of an order of the Court of Appeals of Arizona, Division Two. The Court of Appeals order is unreported.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257 as there has been no final judgment or decree under the circumstances here. *See* page 4 below.

STATUTES INVOLVED

The federal question involves interpretation of the exclusionary clause found in § 1 of the Federal Arbitration Act ("FAA") which states:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1.

Section 12-1517 of the Arizona Revised Statutes (§ 6 of the Arizona Arbitration Act) provides:

> This Article shall have no application to arbitration agreements between employers and employees or their respective representatives.

A.R.S. § 12-1517.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below

Respondent Cyprus Sierrita Corporation ("Cyprus") reduced its workforce on or about December 14, 1992. Petitioners were among those whose employment was terminated and they filed the instant lawsuit protesting their discharges. Respondents have maintained throughout the proceedings in this case that petitioners' claims must be submitted to binding arbitration pursuant to the arbitration agreement contained in the Cyprus employee handbook.

Before the trial court, petitioners filed a motion for partial summary judgment arguing, *inter alia*, that their arbitration agreements are unenforceable because they violate the Arizona constitution and because A.R.S. § 12-1517 precludes their enforcement. Respondents replied that any state law prohibition against enforcement is preempted by the FAA.[1]

The trial court ruled that the arbitration agreements were unenforceable under state law for several reasons, none of which pertained to the Arizona statute. When the Arizona Court of Appeals, on special action, issued its order vacating the trial court's ruling and remanding for further proceedings, it rejected one of the trial court's reasons for denying enforcement as preempted by the

---

[1] Respondents also contended below that the Arizona statute does not prohibit enforcement but simply provides that it shall not be the vehicle to enforce arbitration agreements between employers and employees.

FAA. It disposed of the others on state law procedural grounds.

The Arizona Supreme Court declined to accept jurisdiction over the case, which is presently pending before the trial court.

B. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, respondents bring the following misstatements of fact contained in the petition to the Court's attention.

Petitioners represent that the trial court interpreted A.R.S. § 12-1517 to preclude enforcement of arbitration provisions in employment agreements and held that such preclusion was preempted by the FAA. (Petition at 6). The trial court did neither. In fact, the trial court never mentioned either the federal or state statute in its ruling.

To support their attempt to recast the trial court's ruling as one invalidating the state statute, petitioners also misstate arguments advanced by respondents before the trial court. The quote at the top of page 4 in the petition, from respondents' trial court brief, was responsive to petitioner's argument that the Cyprus arbitration provision violated the state constitution, not A.R.S. § 12-1517. *See* Appendix A. Furthermore, respondents never argued that the state statute prohibited arbitration provisions in employment contracts. (Petition at 4). That argument was advanced by petitioners.

REASONS FOR DENYING THE WRIT

A. This Court is Without Jurisdiction

Section 1257 of Title 28 authorizes this Court to issue a writ of certiorari in circumstances involving a final judgment or decree of a state's highest court. Since neither the court of appeals' order nor the Arizona Supreme Court's refusal to hear the case is final, this court is without jurisdiction. Proceedings presently before the trial court may lead to further special actions or appeals and the state supreme court could yet entertain the question concerning the scope of § 1 of the FAA. *See, e.g., Barclay v. Jones,* 127 Ariz. 282, 284, 619 P.2d 1059, 1061 (App. 1980). *Cf. Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 481, 95 S.Ct. 1029, 1039, 43 L.Ed.2d 328 (1975).

B. There is Not a Substantial Federal Question

This case does not present a substantial federal question because, contrary to petitioners' contention, there is no real split in the circuits concerning the scope of § 1 in the circumstances presented here. Six circuits have expressly construed the scope of the § 1 exclusion narrowly to apply only to workers in the transportation industries. *See, e.g., Dickstein v. Dupont,* 443 F.2d 783, 785 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club,* 468 F.2d 1064, 1069 (2d Cir. 1972); *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers,* 207 F.2d 450, 453 (3rd Cir. 1953); *Rojas v. TK Communications, Inc.,* 87 F.3d 745 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates,* 71 F.3d 592 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers,* 739 F.2d 1159, 1162 (7th Cir. 1984), cert. denied,

469 U.S. 1160, 105 S.Ct. 912, 83 L.Ed.2d 926 (1985). *See, also, Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994); *Armijo v. Prudential Ins. Co.*, 72 F.3d 793, 797 (10th Cir. 1995).

Petitioners cite cases from three circuits to support a more expansive reading of the § 1 exclusion. (Petition at 11). Their reliance on those cases is misplaced. *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991), merely contains dicta that the § 1 exclusionary clause should be read expansively and a subsequent panel of the sixth circuit declined to follow the *Willis* panel's rationale. *See Asplundh* at 597. *Domino Sugar Corp. v. Sugar Workers Local Union No. 392*, 10 F.3d 1064, 1067 (4th Cir. 1993), simply stands for the proposition that the FAA does not apply to collective bargaining agreements.[2] *Wedding v. University of Toledo*, 89 F.3d 316 (6th Cir. 1996), also involved a collective bargaining agreement. Plaintiffs' employment was not covered by a collective bargaining agreement. In *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3rd Cir. 1993), the court did not decide the scope of § 1.

Petitioners argue at length concerning the legislative history and intent of the non-congressional sponsors of the legislation that became the FAA. In the interest of

---

[2] Indeed, arbitration provisions in collective bargaining agreements are enforceable under § 301 of the Labor Management Relations Act (29 U.S.C. § 185). *See Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

brevity, respondents respectfully direct the Court's attention to the discussion of the FAA's legislative history found in *Asplundh* at 597-601.

Accordingly, this case does not present a substantial federal question.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

JON E. PETTIBONE
Counsel of Record
for Respondents
QUARLES & BRADY
One East Camelback Road
Suite 400
Phoenix, Arizona 85012
(602) 230-5572

APPENDIX A

Jon E. Pettibone, Esq. (004600)
Sharon S. Moyer, Esq. (013341)
Colleen A. Scherkenbach, Esq. (WI 1014697)
QUARLES & BRADY
One East Camelback Road, Suite 400
Phoenix, Arizona 85012-1649
(602) 230-5500
Attorneys for Defendants

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

HENRY GARZA, et al., Plaintiffs, v. CYPRUS MINERALS COMPANY and CYPRUS COPPER COMPANY, a wholly owned subsidiary dba CYPRUS SIERRITA CORPORATION, Defendants.	NO. 297607 **DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE: ARBITRATION** (Assigned to the Honorable Robert B. Buchanan) (Filed Sep. 14, 1995)

* * *

II. THE ARBITRATION PROVISION IS ENFORCEABLE AS A MATTER OF LAW.

Plaintiffs' arguments that the Cyprus arbitration provision is legally unenforceable have no merit because it does not violate their constitutional rights, Arizona encourages arbitration, the arbitration clause is not adhesive, and it is supported by sufficient consideration.

A. The Arbitration Provision in the Cyprus Employee Handbook Does Not Infringe Plaintiffs' Constitutional Rights.

Plaintiffs' argument that the arbitration provision deprives them of their constitutional rights is frivolous. The United States Supreme Court dispelled any issue about the constitutionality of arbitration provisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *Gilmer* involved whether an arbitration provision in a standard form NYSE broker agreement applied to the broker's age discrimination claim. The Court discussed the desirability of arbitration, stating that prior cases expressing mistrust for the alternative dispute resolution process are outdated and undermined by more recent decisions. *Id.* at 29 n.5.

Plaintiffs' claim that the arbitration provision violates the Arizona Constitution is similarly without merit. The Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, preempts any state law invalidating arbitration clauses falling under the Act. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting Section 2 of the Federal act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."). The FAA therefore prevents states from carving out exceptions from arbitration if the contract is one "involving commerce." *Id.* at 16.

Some courts have held that employment contracts are excluded from coverage under the FAA, but these decisions do not comport with the language of the Act. *See,*

e.g., Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991). The last sentence of Section 1 of the FAA provides:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Ignoring the reference to transportation workers in the FAA renders its language as surplusage, which is contrary to established rules of statutory construction. *DiCrisci v. Lyndon Guaranty Bank of New York*, 807 F. Supp. 947, 952-53 (W.D.N.Y. 1992).[1] According to the law of this Circuit, plaintiffs' employment contract falls under the Act. *Bayma v. Smith Barney et al.*, 784 F.2d 1023, 1025 (9th Cir. 1986); *But see Herring v. Delta Airlines, Inc.*, 894 F.2d 1020,

* * *

---

[1] *See also Miller Brewing Co. v. Brewery Workers*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied* 469 U.S. 1160, 105 S.Ct. 912, 83 L. Ed. 2d 926 (1985) (Section 1 exclusion limited to workers employed in the transportation industry); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) (exception limited to employees involved in or closely related to the actual movement of goods in interstate commerce); *Tenney Engineering, Inc. v. United Elec. Radio and Mach. Workers*, 207 F.2d 450, 452 (3d Cir. 1953).